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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 15.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 16,

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 18.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

OPINIONS BELOW.

The "memorandum opinion" of the United States District Court for the Eastern District of Missouri, Eastern Division (R. 163-172) and the "memorandum opinion" of the District Judge who dissented (R. 173-5) are reported at 153 F. Supp. 572. The majority below supplemented their opinion by "Findings of Fact and Conclusions of Law"

(R. 177-86) which are not reported. The Report of the Interstate Commerce Commission, Division 5 (R. 559-87), is reported at 53 M. C. C. 415 and the Report of the Entire Commission on Oral Argument (R. 593-615) is reported at 62 M. C. C. 367.

JURISDICTION.

The basis of this Court's jurisdiction is correctly stated in the briefs of appellants.

STATUTES INVOLVED.

One of the bases of the District Court's decision was Section 212 (a) of the Interstate Commerce Act [49 Stat. 555; 52 Stat. 1238; 54 Stat. 924; 49 U. S. C., § 312 (a)]. The appellants in Nos. 15 and 16 raise a question under Section 5 (2) (b) of the Interstate Commerce Act [54 Stat. 906; 49 U. S. C., § 5 (2) (b)], which was formerly Section 213 (a) (1) of the Interstate Commerce Act (49 Stat. 556). These sections of the statutes are set forth in Appendix A.

QUESTIONS PRESENTED.

An order of the Interstate Commerce Commission revoked certain unrestricted certificates of public convenience and necessity eleven years after the Commission had issued such certificates to appellee, a rail-affiliated motor carrier. The certificates had been issued to appellee after its purchase of the unrestricted operating rights and properties of previously existing independent motor carriers under the provisions of former Section 213 (a) (1) [present Section 5 (2) (b)] of the Interstate Commerce Act. The sole ground for the Commission's revocation of the certificates was its finding that the same had been inadvertently issued in their unrestricted form. In lieu of such certificates, the Commission ordered the issuance of certificates limiting

appellee's operations to those auxiliary to and supplementary of the train service of its parent railroad. The District Court enjoined the Commission's order for the reasons that it was in violation of Section 212 (a) of the Interstate Commerce Act and because the finding of inadvertence was without adequate support in the evidence. Therefore, two questions are presented by these appeals:

1. Was the District Court correct in holding that the action of the Commission was an attempt to revoke a duly issued certificate made contrary to Section 212 (a) of the Interstate Commerce Act?

2. Was the District Court correct in holding that the Commission's finding that the certificates in question were inadvertently issued was without adequate support in the evidence?

STATEMENT OF THE CASE.

These cases involve the validity of an order of the Interstate Commerce Commission (hereinafter sometimes referred to as "the Commission") (R. 615-17) which revoked and cancelled certain certificates of public convenience and necessity held by appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. The certificates sought to be revoked authorized appellee to perform motor carrier service directly for the public without any limitations or restrictions as to the type of service. In their stead the Commission ordered the issuance of new certificates which would limit appellee's operations to service which is "auxiliary to or supplemental of" the train service of its parent railroad by imposing conditions similar to those considered in **United States v. Rock Island Motor Transit** (1951), 340 U. S. 419. The sole basis for the Commission's action was its finding that the certificates were "inadvertently issued" (R. 610).

The District Court, with one judge dissenting, held that the Commission's order insofar as it revoked four of appellee's certificates should be enjoined[1] (R. 172, 175-6, 186) because it was contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)] under **Watson Bros. Transportation Co. v. United States** (U. S. D. C. Neb. 1955) 132 F. Supp. 905, aff. (1956), 350 U. S. 927 (R. 170, 185), and because the Commission's finding that the certificates in question had been "inadvertently issued" was without adequate support in the evidence (R. 171, 185).

Appellee's Operations and the Portions Here Involved.

Appellee operates a motor common carrier service (so-called "all-out" service, i. e., the transportation of general commodities for the public at motor carrier rates on motor carrier billing) over approximately 2,700[2] miles in the States of Missouri, Kansas, Oklahoma, Texas, Arkansas, Tennessee, and Mississippi, its principal routes extending from St. Louis, Missouri, southwest through Springfield, Missouri, to Oklahoma City, Oklahoma, and to Dallas, Texas, and from Kansas City, Missouri, southeast through Springfield, Missouri, to Memphis, Tennessee, and beyond to Columbus, Mississippi. In addition, it operates a route from St. Louis, Missouri, south through Cape Girardeau, Missouri, to Blytheville, Arkansas, which is restricted to the handling of freight in substitute service for its parent Railway Company. Appellee's operations generally parallel a part of the lines of its parent railroad, and over

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[1] The Commission's proceedings involved six certificates of appellee. Its order impressed restrictions upon five of those certificates. As to one of these five, herein called the "Bennett" certificate, the District Court affirmed the Commission's action under *United States v. Rock Island Motor Transit* (1951), 340 U. S. 419.

[2] The evidence shows 4,800 miles (R. 237). However, a portion of that mileage is no longer operated.

most of its routes service is limited to points which are stations on the parent railroad or to points not more than ten miles from such stations.

The greater part of appellee's motor carrier system was acquired by the purchase of existing operating rights and physical properties of independent motor carriers pursuant to former Section 213 [now Section 5 (2) (b)] of the Interstate Commerce Act. All of these acquisitions were authorized by the Commission after hearing. Appendix B contains a list of appellee's principal acquisitions.

The proceedings before the Commission which are the subject of these appeals involved six such segments of appellee's over-all operations, 284 miles in all, but which are so situated that, if restricted as proposed, the value of the balance would be seriously impaired, if not destroyed. Throughout the proceedings before the Commission these segments were referred to by their respective Commission docket numbers which, because of their similarity, are not ideal for descriptive purposes. The District Court referred to these segments by the name of the vendor from whom purchase was authorized and described the segments as follows:

> "• • • These are the 'Cooper' route from Joplin, Missouri, to Carthage, Missouri; the 'Hamm' route from Joplin, Missouri, to Miami, Oklahoma; the 'Tolson' route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the 'Parker' route from Blytheville, Arkansas, to Memphis, Tennessee; the 'Rose' route from Hugo, Oklahoma, to Paris, Texas, and the 'Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the 'Rose' certificate the Commission ordered no change. The operating certificate for the 'Bennett' route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities per-

mitted under the certificate, and hence, under the rule of United States v. Rock Island Motor Transit Co., 340 U. S. 419, rehearing denied 341 U. S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate" (R. 165).

Since neither the Commission nor the District Court ordered any change in the "Rose" certificate, it is not involved in this appeal; and since the appellee has raised no objection to the District Court's ruling that the Commission's findings and order in connection with the "Bennett" certificate were proper, these appeals involve only the "Cooper", "Hamm", "Parker", and "Tolson" certificates.

History of These Cases and Evidence Before the Commission.

During 1938 and 1939, appellee filed applications with the Commission under Section 213 of the Motor Carrier Act of 1935 (49 Stat. 556) to purchase the motor carrier operating rights and properties of "Cooper", "Hamm", "Parker", and "Tolson". After hearings were held and examiner's proposed reports were issued in connection with each application, Division 5 of the Commission approved the purchase by appellee of the operating rights and properties of these motor carriers and concluded with the following language (one commissioner dissenting in each case):

"[We find that the purchase by appellee of the operating rights and property of Hamm, Cooper, Parker and Tolson upon the terms and conditions set forth in the applications] which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Rail-

way Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled; provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."

(Cooper, 15 M. C. C. 317, 319, R. 641-2; Hamm, 15 M. C. C. 320, 322, R. 636; Parker and Tolson, 25 M. C. C. 96, 100, R. 629.)

Following this action by Division 5, appellee completed the purchases, and operations of the same nature as those conducted by appellee's predecessors in interest were commenced by appellee in early 1939,[3] and have continued without change as to the nature of such operations and without interruption to the present time.

On various dates in 1939,[4] the Commission issued orders commonly referred to as "compliance orders" in connection with the "Cooper" (R. 441-3), "Hamm" (R. 411-13), "Parker" (R. 455-7) and "Tolson" (R. 475-7) purchases which authorized and directed the issuance to appellee of certificates of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle covering operating authority previously ap-

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[3] These steps were taken with the full knowledge and consent of the Commission in accordance with its regular procedures. See Exhibits 10-A (R. 402), 12-A (R. 433), 13-A (R. 445), and 14-A (R. 461).

[4] Cooper purchase March 11, 1939; Hamm purchase March 14, 1939; Parker purchase June 16, 1939; and Tolson purchase July 10, 1939.

plied for by "Cooper", "Hamm", "Parker" and "Tolson". These orders provided for the issuance of certificates **with no restrictions as to the type of motor common carrier service.**

On March 31, 1942, in the cases of "Cooper" and "Hamm" (R. 498-500) and on April 18, 1942, in the cases of "Parker" and "Tolson" (R. 501-3), the Commission granted to appellee certificates of public convenience and necessity which included inter alia the operating rights purchased from these four vendors, which **certificates contained no restrictions** as to the type of motor common carrier service authorized thereunder.

In July, 1941, prior to the issuance of the certificates of public convenience and necessity in the "Cooper", "Hamm", "Parker" and "Tolson" purchases, competing motor carriers filed a complaint with the Commission, alleging that appellee was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that appellee was not operating in violation of the terms of its certificates. (**Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company**, [1946], 46 M. C. C. 222.) The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the "Cooper", "Hamm", "Parker" and "Tolson" certificates were issued to appellee had been reopened for further hearing by Division 5 in accordance with its report, 43 M. C. C. 641, which the Commission was reversing.

This reopening order, which was entered on January 4, 1945 (R. 196), began the proceedings which give rise to these appeals. It reopened for reconsideration the proceedings by which appellee acquired the segments of its

operation purchased from Rose, Cooper Hamm, Parker, Tolson and Bennett, and provided that an examiner's proposed report should be served on the parties. Pursuant to that order, Examiner David Waters filed a proposed report on reconsideration on February 8, 1945 (R. 198). That report recommended that the Commission should find that a reservation had been "inadvertently" omitted from the six certificates in question (R. 199, 213) and should, therefore, impose restrictions on the operations authorized by these certificates designed to limit such operations to those which were auxiliary and supplementary to the train service of the parent railroad. After appellee filed exceptions to this proposed report, another reopening order was issued by the Commission on May 28, 1945, this time for further hearing (R. 217). Subsequently the reopened proceedings were set for hearing before an examiner (R. 218-220).

At that hearing appellee renewed its motion to discontinue the proceedings and offered two witnesses for the purpose of proving certain matters in connection with that motion (R. 226-9). The first of these witnesses, an auditor for appellee, testified concerning appellee's financial status (R. 231-259). The other witness was appellee's Assistant General Manager who offered testimony accompanied by documents to show that the certificates in question were issued in the form intended by the Commission (R. 259-268, Exhibits 10A-16A, R. 403-527).

Over appellee's protest, the examiner required appellee to furnish two other witnesses (R. 271-278). One of these was an employee of appellee's parent railroad company. His testimony was limited to a description of the rail merchandise operations of the parent railroad (R. 281-332). The other, appellee's General Manager, testified concerning the history of appellee and its operations (R. 333-88).

The testimony of these four witnesses and the exhibits offered in connection therewith constitute all of the evidence taken at any time by the Commission in connection with the reopened proceedings. No evidence was offered either by the Commission or by any other person, nor was any other hearing ever held.

On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverley S. Simms (the latter was not present at the hearing) (R. 529). This report recommended that the Commission find that appellee's certificates above-described (except Bennett) were inadvertently issued and that those certificates (except Rose) should be revoked and new or amended certificates issued containing restrictive conditions designed to limit appellee's service to that which would be auxiliary to or supplementary of the train service of the parent railroad.

After appellee filed exceptions to this recommended report, Division 5 of the Commission issued its report (R. 559). This report differed from the report of the Examiners but upheld its recommended findings with no material change.

An important feature of this report, so far as these appeals are concerned, was its holding that the Commission could "take official notice of [its] administrative procedures and practices"[5] (R. 572). Upon the basis of this holding, Division 5 proceeded to outline the procedure by which certificates were issued (R. 572-3). As a result of its recitation of these administrative practices and procedures, Division 5 held that the omission of a reservation of the power to further restrict appellee's operations had been inadvertently omitted from the certificates and that, therefore, the certificates had been inadvertently issued

[5] The Brief of the Commission cites this holding at page 23 as does the Brief in No. 16, p. 34.

(R. 573). At the only hearing held no mention had been made of the administrative practices or procedures or of taking notice thereof.

Thereafter appellee filed its petition for reconsideration of the report of Division 5 and the Commission reopened the proceeding for oral argument (R. 599); and, after argument, issued its report of the Commission on oral argument (R. 593) and the order which is here under attack (R. 615).

The report of the entire Commission dropped in its entirety the language of Division 5 with respect to the taking of judicial notice of the administrative practices and procedures of the Commission. The basic conclusion of the Commission was in accord with the prior reports: "To the extent that the certificates issued failed to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued" (R. 603). Under these circumstances the Commission held that it was not necessary for it to proceed under Section 212 (a) since no diminution of authority or partial revocation of authority was involved (R. 603-4).

After appellee's petition for reconsideration of this report was denied (R. 557), suit was filed in the District Court to set aside the Commission's order (R. 1). After appropriate proceedings before the District Court (R. 25-162), judgment was entered enjoining the Commission's order as it applied to the Cooper, Hamm, Parker and Tolson certificates (R. 175). The Interstate Commerce Commission and the defendants who were allowed to intervene in support of the Commission appealed to this Court. The Defendant United States of America did not file notice of appeal to this Court, but did file a "Memorandum" in No. 19 adopting the brief of the Interstate Commerce Commission, appellant in that case.

SUMMARY OF ARGUMENT.

I.

Former Section 213 (a) (1) of the Interstate Commerce Act (present Section 5 (2) (b) thereof) does not prohibit the issuance of a certificate authorizing motor carrier service directly for the public by a rail-affiliated motor carrier where operating rights are purchased from an existing carrier. This Court has approved the issuance of such certificates to rail affiliates where applications for new authority are filed under Section 207 of the Act. **American Trucking Associations, Inc., v. United States** (1957), 355 U. S. 141. Section 5 (2) (b) has been construed to authorize the Commission to require a rail affiliate to limit its service to that which is auxiliary to and supplementary of the train service of its parent railroad as a condition of its purchase of operating rights of an existing motor carrier, **United States v. Rock Island Motor Transit Company** (1951), 340 U. S. 419; but although previously considered in detail, this section has never been construed as requiring the Commission to impose such a restriction.

In order to properly administer the Act and maintain the proper balance between railroads, and affiliated truck lines and independent motor carriers, as well as to insure maximum service for the public, the Commission must have the discretion to determine whether or not restriction is called for or justified under the facts of each individual case. The Commission takes this view of Section 5 (2) (b) and is currently issuing such unrestricted certificates to rail-affiliated motor carriers in cases where the evidence justifies issuance, and the statutory conditions are satisfied.

II.

Since the Commission has the power to issue unrestricted certificates to a rail-affiliated motor carrier, the certificates which it attempted to revoke in the present case were fair upon their face and duly issued and could be revoked, under the provisions of Section 212 (a) of the Interstate Commerce Act, only for willful failure to comply with the provisions of the Motor Carrier Act or regulations thereunder. The Commission's action in this case amounted to a revocation of the certificates in question and because such revocation was for reasons other than those provided in Section 212 (a), it was invalid, **Watson Brothers Transportation Co. v. United States** (U. S. D. C. Neb. 1955), 132 F. Supp. 905, motion to affirm granted (1956), 350 U. S. 927.

Section 212 (a) has been strictly construed as a limitation upon the power of the Commission to revoke certificates. Revocation of motor carrier certificates upon the ground of inadvertent issuance is a dangerous practice because of the lack of any reliable or ascertainable standard as to the meaning or existence of inadvertence. If the Commission is allowed to revoke upon the ground of inadvertence, no certificate would be safe from such an attack, nor could any certificate be considered by its holder to be final.

III.

The District Court was correct in finding that there was no evidence to support the Commission's finding that the certificates in question were "inadvertently issued". The Commission inferred that inadvertence existed from two facts; viz., (1) the appearance in the reports approving the purchases of a reservation of the power to restrict in the future and (2) the absence of such a reservation from the certificates. Such an inference cannot be employed be-

cause the facts upon which it is based give equal support to two inconsistent inferences, i. e., inadvertent omission and intentional omission. **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333. Furthermore, since there was positive uncontradicted evidence in the form of compliance orders issued by the Commission between the report approving the purchase and the issuance of the certificate ordering the issuance of unrestricted certificates, the Commission was not entitled to infer that the certificates were inadvertently issued.

None of the appellants take direct issue with the District Court's finding that the finding of "inadvertence" was without adequate support in the evidence. Instead they attack the finding indirectly by reference to the District Court's comments upon the evidence and by arguing that the Commission could have supplied any deficiency of evidence by taking "official notice" of its practices and procedures. This use of "official notice" is contrary to settled law. **Ohio Bell Telephone Co. v. Commission** (1937), 301 U. S. 292.

ARGUMENT.

I.

The Requirements of Section 5 (2) (b) of the Interstate Commerce Act Do Not Prohibit the Issuance of Unrestricted Certificates to Rail-Affiliated Motor Carriers.

Appellants in Nos. 15 and 16 seek a determination by this Court that Section 5 (2) (b) of the Interstate Commerce Act [54 Stat. 906, 49 U. S. C., § 5 (2) (b)] (formerly Section 213 (a) (1) of the Motor Carrier Act of 1935) absolutely prohibits the Interstate Commerce Commission from issuing a certificate of public convenience and necessity to a rail-affiliated motor carrier which authorizes motor service directly for the public when the basis for such certificate is the purchase of operating rights from an existing motor carrier. At the last term this Court decided that the Commission may properly issue such an unrestricted certificate to a rail-affiliated motor carrier upon the basis of an application for new operating rights under Section 207 of the Act (49 Stat. 551, 49 U. S. C., § 307) in **American Trucking Associations, Inc., v. United States** (1957), 355 U. S. 141.

Appellants seek to support the construction of Section 5 (2) (b), which they now assert, upon the basis of a statement by this Court in the **American Trucking Associations** case. Their concern over this matter arises from the fact that the Commission is currently issuing certificates which authorize service by rail-affiliated motor carriers directly for the public in some cases (Brief No. 15, pp. 7-12; Brief No. 16, pp. 37-40).*

There are many very obvious reasons why this claim of the appellants is without merit and should not be passed upon by this Court in these appeals. Initially, the conten-

tion of appellants is in conflict with the language of the proviso which does not, upon its face, prohibit the issuance of such certificates by the Commission. It reads:

> "* * * Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition" (49 U. S. C., § 5 (2) (b)).

If it had been the intention of Congress to absolutely limit the Commission's power so that no rail-affiliated motor carrier could receive a certificate authorizing service directly for the public, it would have been a simple matter to so provide. Certainly the language of this proviso does not convey such an intention.

Upon at least two occasions prior to **American Trucking Associations, Inc., v. United States**, this Court had occasion to consider the meaning of the proviso in Section 5 (2) (b). In **United States v. Rock Island Motor Transit Company** (1951), 340 U. S. 419, the Court said, in considering the "statutory authority" of the Commission to issue a certificate of convenience and necessity covering an acquisition by a rail affiliate under Section 5 (2):

> "We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes, the Commission **may** require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service" (Emphasis added) (l. c. 340 U. S. 430-431).

The use of the permissive "may" clearly negatives an absolute restriction upon the Commission's power. After considering other sections of the statute, the Court continued:

> "The language of the proviso of § 5 (2) (b), we hold, gives the Commission power to enforce the reservation in the certificate • • •.
>
> *Auxiliary and Supplemental.*—The Interstate Commerce Act sets out only generally requirements that must be met by railroad applicants for motor-carrier certificates. In acquisition cases under § 5 (2) the certificate is not to be issued without the statutory findings discussed above that the proposed merger or consolidation will be in the 'public interest' and that the railroad can use the motor service 'to public advantage in its operations.'
>
> The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers. Their connotation is to be gathered from the context in which they have been employed by the Commission. The certificate, pp. 423-424, *supra*, used the phrase to avoid undue restraint on competition. That has been its use from the beginning. The only competition at which the limitation was directed was full railroad competition with over-the-road motor carriers. Appellees urge that the meaning of the words is limited by its application through the restrictions on the certificates at the time it was issued, December 3, 1941" (l. c. 340 U. S. 436-437).

Nothing in this discussion indicates that the Court had any intention to construe Section 5 (2) (b) as requiring that a limited certificate only should be issued to motor carriers. Rather, the opinion taken as a whole demonstrates that the Court was convinced that it was the intention of Congress to grant to the Commission the power to

limit the operation of a rail-affiliated motor carrier, or to allow such a carrier, upon certain proof, to engage in motor carrier service directly for the public.

This interpretation of the **Rock Island** case is supported by this Court's decision in **Interstate Commerce Commission v. Parker** (1945), 326 U. S. 60. A consideration of the **Parker** and **Rock Island** cases leads to the conclusion that this Court's language in **American Trucking Associations, Inc., v. United States**, 355 U. S. 141, about "a rigid requirement of Section 5 (2) (b)" referred to the requirement that the Commission must make certain statutory findings before it could authorize motor carrier service by a rail-affiliated motor carrier, and not to an absolute limitation upon the power of the Commission.

The wisdom of a construction of Section 5 (2) (b) which authorizes the Commission, upon the required statutory findings, to grant unrestricted certificates to rail-affiliated motor carriers, is borne out by the Commission's current practice of issuing such certificates. The cases cited by the appellants in No. 15 all reveal that unless the Commission has such power some communities would be without common carrier service because of a failure of motor common carriers to furnish adequate or, in some cases, any service.[6] Other reasons necessitating the grant of unrestricted rights to rail-affiliates are illustrated in the Commission's order in this case: viz., Rose Certificate (R. 606) and service to Dyess, Arkansas (R. 607).

Unless Section 5 (2) (b) of the Act is construed so as to give the Commission the power, upon the required statutory findings, to grant unrestricted certificates to rail-affiliated motor carriers, its ability to properly regulate the transportation industry as a whole would be hampered. There is no question but that the Commission has granted

[6] In the cases cited by the American Trucking Associations at pages 10 and 11 of its brief, it has unsuccessfully advanced this same argument to the Commission.

such unrestricted certificates in the past, e. g., the certificates granted to appellee in many proceedings other than those here involved. Furthermore, many railroads obtained such certificates under the grandfather clause (Section 206 of the Act). Certainly there has never been any suggestion that the granting of such certificates has stifled or restrained competition in any way, and the policies followed by the Commission and professed by it on the record in this case of granting unrestricted certificates in such cases (R. 145) have certainly not interfered with the development of a strong and vigorous independent trucking industry.

It is noteworthy that the appellants in Nos. 15 and 16 do not assert that the construction of Section 5 (2) (b) for which they contend is required because of any threat of monopoly by the railroads. Such a statement would, of course, have little meaning in light of recent testimony before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Cong., 2nd Sess., where the declining railroad situation was established beyond question.

In fact, one of the chief executives[7] of a labor union member of the Railway Labor Executives' Association, appellant in No. 16, stated in **The Locomotive Engineer, March 14, 1958**, that "In my opinion, the railroad companies should be permitted to sell transportation. I am convinced they should be able to engage in the air, highway and water transportation business, co-ordinating the various forms to give the best possible service to the public, offering such services alone or in combination with rail transportation."

Furthermore, the testimony of Commissioner Eastman as to the reason for the proviso given before a Subcommittee of the Committee on Interstate Commerce, United

[7] Guy L. Brown, Grand Chief Engineer, Brotherhood of Locomotive Engineers.

States Senate, on S. 3606, 75th Congress, 3rd Session, p. 23, does not support the construction of that proviso now advanced by appellants (see footnote 3, I. C. C. v. Parker, 326 U. S. 67, and footnote 9, United States v. Rock Island, 340 U. S. 431).

The appellants in No. 15 suggest that the District Court did not deal with their contention that Section 5 (2) (b) should be construed to prohibit the issuance of unrestricted certificates to a rail-affiliate. The colloquy between Judge VanOosterhout and counsel for the Interstate Commerce Commission refutes this contention (R. 145), as does the holding of the District Court that the Commission's action was an attempt made contrary to Section 212 to revoke "duly issued" certificates.

No answer to the argument of appellants in No. 15 and No. 16 would be complete without pointing out that this question was never presented to the Interstate Commerce Commission. In fact, there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court (R. 34). The appellants in No. 16 were not even parties before the Commission. Simple fairness would seem to dictate that the Commission should have been given an opportunity to express its views upon such a question (cf. **United States v. Tucker Truck Lines** [1952], 344 U. S. 33, 37). While these appellants express grave concern over an alleged lack of notice with respect to the compliance orders, their concern does not extend to the rail-affiliated motor carriers holding unrestricted certificates which would be rendered valueless if their contentions in this case are upheld. Certainly the present contentions of these appellants constitute a collateral attack upon many certificates, of which attack the rail-affiliated certificate holders were never advised while this case was pending before the Commission.

II.

The District Court Correctly Held That the Action of the Commission Was an Attempt Made Contrary to Section 212 to Revoke and Change Duly Issued Certificates.

The Interstate Commerce Commission (appellant in No. 19) and the Railway Labor Executives' Association (appellant in No. 16) attack the holding of the District Court that the action of the Commission was an attempt to revoke duly issued certificates contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)]. Many arguments are advanced against this holding: that the Commission as a quasi-judicial body must have the power to correct errors (Brief No. 19, p. 13; Brief No. 16, p. 23); that it has inherent power to do so (Brief No. 19, p. 19); that it and other agencies have exercised the power to correct errors (Brief No. 19, pp. 14-16; Brief No. 16, pp. 23-24); and that Section 212 (a) does not deprive the Commission of power to correct errors in certificates (Brief No. 19, pp. 20-22).

At least a part of these arguments is directed against a "straw man" erected by these appellants, for the opinion and the findings of fact and conclusions of law of the District Court may be searched in vain for any holding that the Commission does not have the power either inherently, impliedly or specifically to correct clerical errors. The District Court's holding is not that the Commission does not have the power to correct clerical errors, but is that its action **here** was more than such a correction. The District Court stated this as succinctly as possible in one sentence of its opinion: "Under [**Watson Brothers Transportation Co. v. United States** (1956), 132 F. Supp. 905, aff. 350 U. S. 927] the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error" (R. 170).

The real question with which the District Court was confronted was: Could the Commission lawfully revoke appellee's unrestricted certificates and reissue such certificates in restricted form without contravening the provisions of Section 212 (a)? The Commission recognized that Section 212 (a) had to be circumvented, otherwise its action would be invalid. Accordingly, it found that its action in revoking appellee's certificates was not governed by Section 212 (a), using the following language:

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. **Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with provisions of section 212 (a).** No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved." (Emphasis added.) (R. 603-4.)

The Commission's conclusion that Section 212 (a) did not apply to the action that was taken in this case was based upon a statement it made in 1942 in **Smith Bros. Revocation of Certificate**, 33 M. C. C. 465:

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically pro-

vided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

"In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained [by fraud, or misrepresentation, or one issued in error[8]] by this Commission, may not be changed or revoked without proceeding under section 212 (a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error" (l. c. 33 M. C. C. 472).

Patently, the statement concerning "inadvertently issued" certificates was obiter dictum. Despite the well-settled rule that such expressions should not control the result of subsequent cases[9], the Commission has through the years based its action correcting certificates, which allegedly were inadvertently issued, upon this statement in the **Smith Bros.** case.

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[8] Modified to read: "by fraud or misrepresentation, or inadvertently issued." 42 M. C. C. 211.

[9] *Harriman v. Northern Securities Co.* (1905), 197 U. S. 244, 291.

It will not be the purpose of this brief to argue the merits or demerits of the cases where the Commission has cancelled certificates on the grounds of inadvertence where the certificates were prematurely issued, e. g., Greyhound Corp. Extension Slidell, La. (1947), 47 M. C. C. 103, cited by the appellants in Nos. 16 and 19, or where a certificate authorized service to a non-existent point by inserting an erroneous state designation, e. g., Motor Rail Application (1949), 49 M. C. C. 109, or the other incidents where the Commission has acted upon the "inadvertence" power implied in the **Smith** case without objection by the parties affected.

Rather, we point to the settled rule, recognized in the **Smith Bros.** case (l. c. 33 M. C. C. 471), that the Commission is an agency of limited powers and, therefore, important powers should not be read into the Interstate Commerce Act by implication.[10] Against the back-drop of this rule, the plain and unambiguous language of Section 212 (a) authorizing revocation only upon the grounds of willful violation of the act or regulation of the Commission allows no room for implication of any additional grounds for revocation and compels the strict interpretation which has been applied by this Court in the past.

In another "inadvertence" case involving a water carrier certificate, **United States v. Seatrain Lines, Inc.** (1947), 329 U. S. 424, this Court said, in commenting upon the **Smith Bros.** case:

> "We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded * * * that the issuance of the original certificate was not an 'inadvertent' error which the Commission's subsequent action was intended to correct.
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> * * * * * * * *

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[10] *Thompson v. U. S.*, 246 U. S. 547; *U. S. v. Pennsylvania R. R.*, 242 U. S. 208.

"But in ruling upon its power to revoke motor carrier certificates the Commission itself has held that unless it can find a reason to revoke a motor carrier certificate, which reason is specifically set out in § 212 (a), it cannot revoke such certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465" (l. c. 329 U. S. 428-31).

The majority of the Commission looked upon this Court's citation of the **Smith Bros.** case as an implied acceptance of its power to revise an inadvertently issued certificate (R. 602). However, this view was apparently not shared by the two Commissioners who dissented (R. 611, 613).

The District Court did not agree with the Commission that the revocation of a certificate is any less a revocation because it is done upon the ground of correcting a clerical error. In so deciding, the District Court relied upon **Watson Bros. Transportation Co. v. United States** (U. S. D. C. Neb., 1955), 132 F. Supp. 905, aff. 1956, 350 U. S. 927.

The appellants go to great lengths attempting to distinguish **Watson** because it presents the clearest case in which the courts have condemned the revocation of a certificate upon the sole ground that it had been inadvertently issued.

There Watson had, prior to 1947, been granted various operating rights by the Commission. Under some of those rights it was not authorized to transport dangerous explosives. It filed an application seeking a certificate which would authorize the transportation of such explosives "on all the routes" over which it was authorized to haul general commodities, which term as used by the Commission does not include dangerous explosives. At the hearing, its application was amended to seek authority to serve the United States Government with explosives at four arsenals,

to and from which it then had no authority to transport either general commodities or explosives.

The trial examiner's recommended report and order provided that Watson be granted authority to transport only dangerous explosives to and from the four arsenals involved. No exceptions were taken to this report and it became the report and order of the Commission. Subsequently, however, the Commission issued a certificate to Watson which authorized the hauling of *general commodities* to and from the four arsenals. After the issuance of this certificate, Watson expended substantial sums of money for equipment to be used in rendering the service authorized by the certificate.

Thereafter, on the sole ground that the certificate had been issued "through inadvertence," the Commission, without notice or hearing, issued an order which changed Watson's certificate to provide for hauling to and from the four arsenals of *only explosives*. Watson brought suit before a three-judge court to enjoin the enforcement of this order, and the court held:

> "The Certificate issued July 19, 1949, granted plaintiff authority to transport 'general commodities' to and from four designated ordnance plants. The order of August 25, 1953, restricts this authority to the transportation of Class 'A' and 'B' explosives. Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212 (a), it is invalid.
>
> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical

error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued" (l. c. 132 F. Supp. 909).

This Court granted a Motion to Affirm (350 U. S. 927).

The certificates here in question are, and were, admittedly unrestricted, and the Commission has previously held that the "performance of direct motor carrier service" by the appellee over the routes covered thereby is lawful [**Campbell Sixty-Six Express, Inc. v. Frisco Transportation Company** (1946), 46 M. C. C. 222, 224-225].

That the intention of the Commission's order and its effect are to revoke and cancel these certificates is clear and unmistakable from the report of the Commission.

> "Under these circumstances the certificates may be revoked * * *" (R. 603).
>
> "We find that the certificates * * * should be cancelled * * *" (R. 610).

The narrow limits within which the Commission has power to revoke or change certificates is clearly indicated by the decision of this Court in **Castle v. Hayes Freight Lines** (1954), 348 U. S. 61, 63-4, where the Court said:

> "And [49 U. S. C. Sec. 312], provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided', but in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it."

Castle stands for the proposition that an agency other than the Commission (there a state) may not revoke a certificate.

The holding in **Watson Bros. Transportation Company v. United States** (supra), emphatically demonstrates that the Commission does not possess the power to cancel a certificate for reasons other than those stated in Section 212 (a).

In the **Watson** case, the order which was enjoined merely reduced the number of commodities which could be handled over the routes involved. In the present case, the order under attack has the effect of changing completely the type of service which appellee can render over the routes in question.

Furthermore, the restriction of the type of authorized operation over the "Hamm" and "Cooper" segments was designed to—and unquestionably does—obliterate appellee's right to render all-motor service between all points north and east of that segment on the one hand and points south and west thereof on the other. The same is true of the restriction of operations over the "Tolson" segment. In short, certain of appellee's previous rights have been completely cancelled. Clearly if, as in the **Watson** case, a reduction of the number of commodities a carrier can handle over a certain route is "an attempt made contrary to Section 212 to revoke and change a certificate duly issued", then the District Court was correct in holding that the absolute cancellation of appellee's rights to render service directly for the public is likewise contrary to the provisions of that section.

One need not go far into the record in this case to see the wisdom of the strict interpretation of Section 212 represented by **Castle** and **Watson**. Appellee's purchase of "Hamm", for example, was completed on January 3, 1939 (R. 408). Thereafter in correspondence with the Com-

mission, appellee was instructed to adopt the vendor's tariffs—which provided for motor carrier service directly for the public (R. 403-4). Appellee advised the Commission that it did adopt such tariffs (R. 405-6) and on March 11, 1939, the Commission issued the "compliance order" directing that a certificate should issue with no restrictions as to the type of service authorized to be rendered (R. 411-13). In the interval between the issuance of the compliance order and the issuance of a certificate (R. 414), the Commission considered the content of the compliance order and the character of appellee's service without ever intimating that it had any intention of limiting appellee's service to that which was auxiliary to or supplementary of the train service of the parent railroad. **Ozark Truck Lines, Inc.—Common Carrier Application** (1942), 32 M. C. C. 459, and **Frisco Transportation Company-Purchase-Ozark Truck Lines, Inc.** (1940), 35 M. C. C. 255.

Approximately the same sequence of events occurred in connection with the "Cooper", "Parker" and "Tolson" purchases. See Exhibits 12A (R. 433), 13A (R. 445) and 14A (R. 461).

After all of these considerations and after the filing of a complaint by other carriers (**Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company**, 46 M. C. C. 222), it was not until the report of Examiner David Waters, issued on February 8, 1945 (R. 198), that there was ever any indication that there was inadvertence connected with the issuance of the certificates in question. As we will discuss below, there was absolutely no evidence to support Examiner Waters' finding of inadvertence and at no time subsequent to the issuance of that report did the Commission or any other person ever offer evidence from which the Commission could have found that inadvertence did in fact exist in the issuance of appellee's certificates.

It is difficult to imagine any circumstances under which an inadvertent error could not be claimed if the Commis-

sion may successfully claim one in this case. Unquestionably this is the reason why the brief of the American Trucking Associations (Appellant in No. 15) is silent as to the District Court's finding that the Commission's action was contrary to Section 212. If the Commission's decision had been allowed to stand, there would not be a single motor carrier certificate which would be safe from the claim of inadvertent issuance.

We submit that the District Court was correct in holding that the action of the Commission was more than the mere correction of a clerical error and was, in fact, an attempt made contrary to Section 212 (a) of the Interstate Commerce Act to revoke a "duly-issued" certificate.

III.

The District Court Was Correct in Finding That the Commission's Order Was Without Adequate Support in the Evidence.

(a) The Commission's finding that the certificates were "inadvertently issued" was based upon an inference.

In its memorandum opinion the District Court found that the Commission's finding that appellee's certificates had been issued inadvertently was "without adequate support in the evidence" (R. 171). As facts, the District Court found:

> "21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13, inclusive, herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence

that a clerical error in fact existed in the issuance of the certificates in question.

"22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913, Sub. No. 1, MC 89913, Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913, Sub. No. 6" (R. 182).

As a matter of law, the District Court concluded:

"11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were 'inadvertently issued' is without adequate support in the evidence" (R. 184-5).

"16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled" (R. 185).

It is noteworthy that none of the appellants take direct issue with these conclusions. Rather, they attempt to attack them indirectly. Appellants in No. 15 merely ignore these conclusions, discussing instead the question of whether any notice of the compliance orders was or should have been given to the motor carrier protestants and attempting to distinguish the **Watson Bros.** case (Brief No. 15, pp. 12-19).

On the other hand, appellants in No. 16 seem to take the position that because two examiners' proposed reports, a Division 5 report and a Commission report found that the certificates had been inadvertently issued, there must have been evidence to support the finding of inadvertence. These appellants do not direct their argument to the specific findings of fact and conclusions of law above noted, but instead they criticize the District Court's memorandum

opinion in which that court stated that its view of the evidence was that no clerical error existed. These appellants, apparently sensing the insufficiency of the evidence to support the finding of inadvertence, refer to the report of Division 5 where the Division attempted to take judicial notice of its administrative practices and procedures (R. 572, Brief No. 16, pp. 27-35).

Still a third position is taken by the Interstate Commerce Commission, appellant in No. 19. It ignores the conclusion of the District Court that the Commission's finding was without adequate support of evidence, as well as the District Court's view that such evidence as did exist compelled the conclusion that no clerical error existed, and attacks the District Court's comment that the Commission's action reflected a change in its policy rather than a correction of a clerical error.

The failure of any of the appellants to take direct issue with the findings of facts 21 and 22 and conclusions of law 11 and 16 of the District Court represents, in our view, a fatal weakness in the differing position each of them takes. However, in the interest of not only supporting the opinion of the District Court, but of also demonstrating the fatal weakness in the report and order of the Interstate Commerce Commission, we will proceed to demonstrate by reference to the Commission's report and to the matters included in the evidence that there was no basis whatsoever for the ultimate finding of the Commission that the certificates sought to be revoked were inadvertently issued.

The report of the Commission opens with the statement that the proceedings involved "principally the issue of whether certain certificates heretofore issued Frisco Transportation Company * * * were inadvertently issued" (R. 593). The finding of the Commission is stated as follows:

> "We find that the certificates issued to the Frisco Transportation Company in the [Hamm-Cooper, Tolson,

Parker and Rose] were inadvertently issued; that such certificates except [Rose] should be cancelled and at the same time new or amended certificates should be issued * * * (R. 610).

At no point between the Commission's original statement of the issue and its ultimate finding does it refer to any specific act of inadvertence, error, or omission.

The best demonstration of the reasoning of the Commission is found in its report:

"* * * The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, 'the approval was made subject to a definite proviso reserving' the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed 'shall be auxiliary or supplementary to the train service' of the Railroad. Except with respect to the certificate issued in [Bennett], none of the certificates contain such a limitation. The Transportation Company points out, and correctly so, that in each of the proceedings included herein except in [Bennett], a so-called compliance order was issued by division 5 in each such proceeding shortly after the authorized purchase had been consummated" (R. 600-601).

"* * * These compliance orders do not contain the above-described limitation, * * *, which was contained in the findings in each of the finance proceedings" (R. 601).

"* * * The limitation, however, was specifically included in the findings in each of the finance proceed-

ings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus, the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation" (R. 602).

"* * * In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

"We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. **To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued.** Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority is involved." (Emphasis added.) (R. 603-4.)

When the Commission's reasoning is analyzed it becomes apparent that only two isolated facts are the basis of the finding (or conclusion) of inadvertence: (1) that in each of the finance proceedings the report of Division 5 contained a specific reservation of the power to limit the service to be performed to that which was auxiliary to and supplementary of the train service of the railroad and (2) that a similar reservation did not appear in the cer-

tificate as finally issued. From these two facts alone the Commission makes an inference (which is, in fact, patent speculation) that the certificates were inadvertently issued.

As the above will indicate, except for its statement that "Thus the error, if it be an error, occurred first in the compliance orders" (R. 602) the Commission makes no attempt to determine how or why the certificates in question were issued containing the alleged error. Nor is there any reference in the entire report to evidence concerning the process of issuing certificates.

The only evidence relating to events which occurred between the finance reports and the issuance of certificates was contained in the testimony of Witness Bryant (R. 259), who was offered by appellee in support of its motion for discontinuance of the proceedings before the Commission.

Bryant's testimony was based upon seven exhibits, six of which were devoted to the recapitulation of various documents pertaining to the issuance of the certificate in each of the six segments of appellee's operation which were reopened by the Commission. Exhibits 10-A, 12-A, 13-A and 14-A covered the segments involved in these appeals.

Each of these exhibits showed that the Commission advised appellee that the purchases were approved (R. 410, 434, 454) and that appellee should adopt the vendors' tariffs (R. 413, 434, 449, 463). Notices were filed by appellee adopting the vendors' tariffs in each case (R. 406, 436, 448, 465). It should be noted that in each instance the tariffs which were adopted by this act provided for motor carrier service directly for the public. Throughout all of the correspondence with the Commission no mention was ever made of any restrictions or limitations upon the

rights which appellee was acquiring and undertaking to operate.

Each of these exhibits also contained copies of the "compliance orders"[11] (Hamm—Exhibit 10-A, R. 411-13; Cooper—Exhibit 12-A, R. 441-3; Parker—Exhibit 13-A, R. 455-7; Tolson—Exhibit 14-A, R. 475-7). The compliance orders provided that upon compliance with certain sections of the Act (dealing with tariffs, insurance, etc.) certificates of public convenience and necessity would be issued to appellee. The form of the certificates ordered to be issued by the compliance orders did not provide for any limitation or restriction upon the type of service authorized to be rendered by appellee.

Exhibit 16-A (R. 494) was a copy of the various certificates issued to appellee. This was all of the evidence ever introduced touching upon the issuance of the certificates.

The Commission's use of an inference that the certificates had been inadvertently issued was not the first time that such an inference had been used in this proceeding. Even before any hearing was held Examiner Waters reached a similar conclusion without the benefit of any of the evidence which was introduced at the only hearing in the reopened proceeding (R. 199). Examiners Croft and Simms (Simms was not present at the hearing) recom-

[11] A "compliance order" was a standard type of order generally in use in claimed grandfather cases under Section 206 at the time of appellee's original purchases, which provided that upon compliance by applicant with the provisions of Sections 215, 216 and 217, and with the rules and regulations issued under such sections "a certificate of public convenience and necessity shall be issued" to applicant. Such orders set forth in detail the commodities the applicant was authorized to carry, the routes over which it was authorized to carry the same, and any limitations or restrictions upon the service it was authorized to render.

If any interested party considered the "compliance order" to be in any respect incorrect, the standard practice was for that party to file a protest, see *Crescent Express Lines v. United States* (1943), 320 U. S. 401, 403. After a reasonable time, in the absence of protest from anyone, the certificate was issued.

mended that the Commission conclude that the certificates had been inadvertently issued (R. 532) in almost the identical language which was ultimately used by the entire Commission (R. 603). While this same language and reasoning appeared in the report of Division 5 of the Commission (R. 573), that Division apparently sensed the insufficiency of the evidence to support its conclusion and attempted to supply the deficiency by taking "official notice" of the administrative procedures and practices of the Commission (R. 572).

Although the entire Commission has abandoned this reasoning in its final report, the appellants in Nos. 16 and 19 still consider that it should be used (Brief No. 16, p. 34; Brief No. 19, pp. 23-24).

The attempted use by Division 5 of "official notice" is entirely improper and has been condemned by the courts. The statement of Division 5 is a perversion of the applicable rules of evidence relating to judicial or official notice. That a matter is judicially noticed means, merely, that it is taken as true without the necessity of offering of evidence by the party who should ordinarily have done so. This is because the courts assume that the matter is so notorious that it will not be disputed, but the opponent is not prevented from disputing the matter if he so desires (Wigmore on Evidence, 3rd Edition, Vol. IX, Sec. 2567, p. 535).

Judicial knowledge of a fact is measured by general knowledge of the same, and a fact is said to be generally recognized or known when its existence or operation is accepted by the public without qualification or contention (20 Am. Jur. 49). Such is not the case here, since the matters detailed in the report of Division 5 are not so notorious as to be indisputable, but are rather matters coming only within the personal official knowledge of the Commission and its staff members and may not unequivocally be taken as indisputable facts.

"(2) A special danger of the infraction of this fundamental rule is found in proceedings before **administrative officials—such as the Interstate Commerce Commission,** the Federal Trade Commission, and other administrative bodies listed ante, § 4c, where in their accumulated experience a certain amount of information lies hidden. It ought to be elementary, as it is fundamental, that they should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. Otherwise, the party affected has no fair chance to test and, perhaps, dispute that supposed knowledge; nor is the appellate tribunal furnished with a dependable record. Yet the breach of this fundamental rule has been not infrequent." (Emphasis added.) Wigmore on Evidence, 3rd Edition, Vol. VI, Sec. 1805, p. 257.

The use of official notice in the manner in which it was done by Division 5 has been clearly condemned by this Court in **Ohio Bell Telephone Co. v. Commission** (1937), 301 U. S. 292, 300-305. There this Court held that even when official or judicial notice may properly be taken, it has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence and that where the use of judicial notice is taken after the case has been submitted, the doctrine is turned into a pretext for dispensing with a trial. The **Ohio Bell Telephone** case stands for the proposition that the use of judicial notice in the manner in which Division 5 attempted (and which the appellants support) here, violates the very rudiments of fair play assured to every litigant. If the Commission's report and order can only be supported upon the theory that Division 5 was correct in taking official notice of the administrative practices and procedures of the Commission, then it should be enjoined as violation of the due process clause of the 5th Amendment to the Constitution.

In **The Chicago Junction Case** (1924), 264 U. S. 258, 264, this court said: "Facts conceivably known to the Commission but not put in evidence will not support an order." See also **Interstate Commerce Commission v. L. & N. R. R. Co.** (1913), 227 U. S. 88, 93, and **U. S. v. Abilene & Sou. Ry. Co.** (1924), 265 U. S. 274, 288.

These principles not only condemn the use by Division 5 of "official notice," but also the attempted introduction by the Commission of Government Exhibits 1-8 at the hearing before the District Court (R. 29-39, 622-653).

(b) The evidence used by the Commission as a basis for its inference of inadvertence gives equal support to the inference that the unrestricted certificates were intentionally issued. Therefore, inadvertence was not established.

As demonstrated above, the Commission's finding that appellee's certificates were inadvertently issued has been based solely upon (1) the appearance of a reservation of the power to restrict in the various finance reports and (2) the non-appearance of that reservation in the certificates as finally issued. There has been no attempt to use any evidence as to what happened or did not happen between the rendition of the reports in the finance proceedings in 1938 and 1939 and the issuance of the certificates in 1942. Without such evidence, it was necessary to employ an inference to reach the finding of supposed inadvertence.

The two facts used by the Commission as a basis of its finding of inadvertence, when taken alone, as the Commission has done throughout this case, may be used not only to reach the inference of inadvertence, but can be used with equal validity to infer and thereby reach the conclusion that between the finance reports and the issuance of the certificates, the Commission, after deliberation, con-

cluded that the reservation to restrict should be omitted from the certificates.[12]

Both inferences, i. e. inadvertence on the one hand and an intentional omission on the other, are equally consistent with the facts used by the Commission. The arbitrary selection of one of two such inferences to the exclusion of the other violates basic rules of logic and reasoning. The error of logic committed by the Commission in arbitrarily selecting as its conclusion the inference that the certificates were inadvertently issued has been condemned by this Court.

In **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333, this Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover [citing cases]," l. c. 339.

While it is true that the **Chamberlain** case was passing upon the question of whether evidence was sufficient to submit a case to a jury, it has been held that the rules of logic and reasoning set forth in that case, which are necessary to the accomplishment of the type of adjudication guaranteed under our system of law, must be applied to the decisions of an administrative agency where the agency

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[12] The Brief of the Commission admits as much when it says:

> "With the passage of time since the issuance of the original compliance orders and certificates, we cannot tell whether the omission from the compliance orders and certificates of the reservation of power to impose conditions was a simple mistake or oversight on the part of the Commission employees involved, or whether, for example, they thought it unnecessary to restate the reservation in the compliance orders and certificates" (Brief No. 19, p. 25).

has acted as a trier of fact. **Cupples Co. v. N. L. R. B.** (C. A. 8, 1939), 106 F. 2d 100, 113-14.

Since a finding of the Interstate Commerce Commission must be supported by substantial evidence, the principles of logic set forth in the **Chamberlain** case should be applied to it as they have been applied to the National Labor Relations Board. Where proven facts give equal support to the two inconsistent inferences, neither of them is proven. Here, the facts used by the Commission do not prove inadvertence because they give at least equal support to the inference that the unrestricted certificates were intentionally issued after further consideration by the Commission. Therefore, neither inference is proven and the order of December 7, 1953 (R. 615-17), was invalid and the District Court properly enjoined it because the basic finding upon which it was based was not supported by evidence.

(c) Since there was positive, uncontradicted evidence that inadvertence did not exist, the Commission was not entitled to infer that the certificates were inadvertently issued.

The Commission states that if an error occurred, it occurred first in the "compliance orders" because the certificates issued merely followed the compliance orders (R. 602). No further reference is made by the Commission to the compliance orders. Actually the compliance orders negate the finding that the unrestricted certificates were inadvertently issued. It requires only a consideration of the compliance orders which were in evidence before the Commission[13] to see that these orders affirmatively establish that the certificates were not inadvertently issued.

Each of these orders begins with the phrase: "At a Session of the Interstate Commerce Commission, Division 5,

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[13] Hamm—Exhibit 10-A, R. 411-13; Cooper—Exhibit 12-A, R. 441-3; Parker—Exhibit 13-A, R. 455-7; Tolson—Exhibit 14-A, R. 475-7.

held at its office in Washington, D. C., on the 14th day of March, A. D. 1939." After stating the caption of each individual proceeding, the order continues: "This proceeding coming on for further consideration . . ." After reciting certain facts, the order proceeds: "[Upon compliance with the requirements of certain sections of the Motor Carrier Act] a certificate of public convenience and necessity shall be issued unless otherwise ordered authorizing [Frisco Transportation Company] to engage in interstate or foreign commerce as a common carrier by motor vehicles [according to the specifications set forth in the appendix of the order]." The appendix contains no restriction or reservation of the power to impose a restriction to "auxiliary or supplemental" service.

No evidence was introduced at the Kansas City hearing or at any other time to indicate that there was any defect, procedural or otherwise, in the compliance orders. The compliance orders, standing uncontradicted as they do and containing the language which they contain, establish that the unrestricted certificates were issued upon the basis of a valid order of the Commission which completely negatives any alleged administrative or clerical inadvertence. Likewise, there never has been an attack upon the validity or correctness of any compliance order involved in this proceeding by the Commission or any other interested party.

A positive indication that Division 5, in issuing the compliance orders in the Hamm and Cooper purchases, did not consider that the certificates authorized by such compliance orders were subject to the restrictions, now alleged to have been inadvertently omitted, is contained in the Division's report in a separate proceeding decided February 19, 1942, which involved the right of appellee to serve certain intermediate points between Treece, Kansas, and St. Louis, Missouri, over a route which included the routes covered by the Hamm-Cooper purchases. In discussing the rights which appellee already had, Division 5 said:

"By virtue of its acquisition of other 'grandfather' operating rights, Frisco has been granted certificates embracing the entire length of this route except that portion between Carthage and Springfield, Mo. Pursuant to authority granted in **Frisco Transp. Co.—Purchase—Hamm**, 15 M. C. C. 320, it purchased the operating rights claimed in 'grandfather' application No. MC-29652; it was renumbered No. MC-89913 (Sub No. 1), and by order therein, **entered March 14, 1939, Frisco was granted a certificate to operate between Miami, Okla., and Joplin, Mo., via Treece, serving all intermediate points.** Pursuant to authority granted in **Frisco Transp. Co.—Purchase—Cooper**, 15 M. C. C. 317, Frisco purchased the operating rights claimed in 'grandfather' application No. MC-20440; it was renumbered No. MC-89913 (Sub 3), and by **order therein, entered March 11, 1939, Frisco was granted a certificate to operate between Joplin and Carthage, serving Webb City and Carterville, Mo., as intermediate points.**" (Emphasis added.) **Ozark Truck Lines, Inc., Common Carrier Application**, 32 M. C. C. 459, 460. [This quotation was incorporated in Exhibits 10-A (R. 414) and 12-A (R. 444).]

Clearly, the Division had considered the compliance orders and made no mention of any restriction. Nor did it indicate any doubt that the rights possessed by appellee were unrestricted.

For a similar statement concerning appellee's rights over the Tolson segment, see the last paragraph on page 459 of Record, which is a quotation from a report of the Commission, decided October 30, 1942, covering an application by appellee for certain additional authority.

There are other positive uncontradicted facts which establish beyond question that the certificates were not inadvertently issued:

(1) The certificate, issued March 31, 1942, to cover Hamm and Cooper (Exhibit 16-A, R. 498-500) also covered operating rights issued as a result of the Ozark purchase, 35 M. C. C. 255. The orders in these cases provided that duplications should be eliminated. Since the Ozark rights overlapped both Hamm and Cooper, the preparation of the certificate required more than mere copying. Some administrative determination as to the elimination of duplications was necessarily made.

(2) The certificate, issued April 18, 1942, to cover Parker and Tolson (Exhibit 16, R. 501-03) also covered operating rights issued as a result of the Blake purchase, 35 M. C. C. 132. Here again the elimination of duplications required some administrative determination.

These facts bring the present case clearly within the second principle of logic set forth in **Pennsylvania Railroad v. Chamberlain** (supra), which this Court stated as follows:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions [citing cases]." l. c. 288 U. S. 340-41.

We think it is significant in this connection that at no point in the examiner's report, the report of Division 5, or in the report of the Commission on oral argument is there any specific finding that the compliance orders were "inadvertently issued." In view of the very purpose as well as the language of the compliance orders, such a finding

or theory of the case would be untenable because it must, of necessity, be based upon the premise that an order of the Commission which recites that it was entered "At a Session of the Interstate Commerce Commission," in fact, represents the decision of some person or persons other than the duly appointed commissioners.[14] The attempt by Division 5 of the Commission in its report (R. 572) to take judicial notice of administrative procedures and practices of the Commission would indicate that this may perhaps be the case.

We therefore submit that the finding of the Commission that the certificates were inadvertently issued was not supported by substantial evidence because "inadvertence" was inferred by the Commission solely from two facts which give at least equal support to an inference that the unrestricted certificates were intentionally issued upon a valid order of the Commission and for the further reason that the Commission was not entitled to infer that the certificates were inadvertently issued when there was positive, uncontradicted evidence which established that the certificates were issued as a result of further consideration by the Commission and valid orders (the compliance orders) directing the issuance of unrestricted certificates.

Because the order was not supported by substantial evidence the District Court was correct in enjoining its enforcement.

(d) **The District Court was justified in commenting that the evidence showed that no clerical error existed and that the Commission was attempting to limit the certificates in line with its present policy.**

The opinion of the District Court is a "two-barreled" condemnation of the report of the Commission. As a pri-

[14] It is interesting to note that all certificates begin with the phrase "At a Session of the Interstate Commerce Commission, Division 5, held * * *." (Exhibit 16-A, R. 495-6, 498, 501, 503, 505, 514.)

mary ground for its action the District Court found that the action of the Commission was contrary to Section 212 (a). This holding alone was sufficient to dispose of the case (R. 170). However, the District Court recognized its function to review the entire record and to cover the entire case in its opinion. It, therefore, proceeded upon the assumption that the Commission could enter the order without contravening of provisions of Section 212 (a) and considered the evidence. In this consideration of the evidence the District Court found that it could not approve the report and order of the Commission because there was not adequate evidence of the basic finding of inadvertence. In examining the evidence the District Court concluded two things: (1) That no clerical error existed and (2) that the Commission must have changed its policy if it had now decided to restrict appellee's certificates.

The Interstate Commerce Commission challenges this latter comment. It should first be noted that this comment was not included in the District Court's findings of fact and conclusions of law. It was not one of the two specific reasons advanced by the District Court for enjoining the order of the Commission.

However, there were many facts of record which could easily furnish a basis for the comment made by the District Court, not the least of which is the fact that the Commission's action affects four crucial segments located in the center of appellee's two main lines of operation and attempted to restrict them despite the fact that it had issued unrestricted certificates to appellee covering operations extending in both directions from the questioned certificates. The fact that this was not even started until four years after competing motor carriers had filed a complaint, which brought to the Commission's attention the unrestricted character of operations in which appellee was engaging, is at least indicative of a reversal of policy by the Commission. As the excerpts from Commission decisions which

were made a part of Exhibits 10-A-15-A, inclusive, demonstrate, the Commission had upon other occasions examined the operating rights held by appellee and showed no concern whatsoever over the unrestricted character of those operations.

It was undisputed facts such as those above noted which unquestionably brought forth the District Court's comment which we submit it was entitled to make. That this comment was not a basis of its decision is readily apparent from findings of fact and conclusions of law.

CONCLUSION.

The District Court correctly found that the order of the Interstate Commerce Commission violated Section 212 (a) of the Interstate Commerce Act, and was not supported by adequate evidence. For the reasons above stated, none of the appellants has demonstrated that the District Court committed any error. Therefore, the judgment below should be affirmed.

Respectfully submitted,

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September 24, 1958.

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Certificate of Service.

I, Ernest D. Grinnell, Jr., one of the attorneys for appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of September, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Wayne H. Bigler, Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and to The Solicitor General and Maurice A. Fitzgerald, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Robert Ginnane, its General Counsel, at the offices of the Commission, Washington 25, D. C., and to Charlie H. Johns, Jr., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Railway Labor Executives' Assn. et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to James L. Highsaw, Jr., and Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C., to Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, and to Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio.

4. On the American Trucking Associations, Inc., et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to Gregory M. Rebman, 1230 Boatmen's Bank Bldg., 314 North Broadway, St. Louis 2, Mo.; to Wentworth E. Griffin, 1012 Baltimore Street, Kansas City, Mo., and to Peter T. Beardsley, 1424 Sixteenth St., N. W., Washington 6, D. C.

Ernest D. Grinnell, Jr.

APPENDIX A.

Statutes Involved.

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant

or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Sec. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful

order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C., Section 313 (a) (1)]. Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public

interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPENDIX B.

Principal Acquisitions of Operating Rights by Frisco Transportation Company.

Frisco Transportation Company—Purchase—John Hamm, 15 M. C. C. 320.

Frisco Transportation Company—Purchase—Joseph D. Cooper, 15 M. C. C. 317.

Frisco Transportation Company—Purchase—Joseph W. Parker, 25 M. C. C. 96.

Frisco Transportation Company—Purchase—Louis Tolson, 25 M. C. C. 96.

Frisco Transportation Company—Purchase—J. A. Rose, 15 M. C. C. 323.

Frisco Transportation Company—Purchase—T. N. Bennett, 35 M. C. C. 802.

Frisco Transportation Company—Purchase—C. F. Reddish, 35 M. C. C. 132.

Frisco Transportation Company—Purchase—Keystone Freight Lines, 39 M. C. C. 802.

Frisco Transportation Company—Purchase—Luper Transportation Company, 39 M. C. C. 813.

Frisco Transportation Company—Purchase—Mrs. B. T. Blake, 35 M. C. C. 132.

Frisco Transportation Company—Purchase—Ozark Truck Lines, Inc., 35 M. C. C. 255.

Frisco Transportation Company—Purchase—Powell Bros. Truck Lines, Inc., 39 M. C. C. 809.

Frisco Transportation Company—Purchase—William B. Mayers, 38 M. C. C. 820.